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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No.

NATIONAL BELLAS HESS, INC., a corporation,
Petitioner,

v.

EVA N. KALIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court.

Petitioner, National Bellas Hess, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on October 9, 1951.

Opinions Below

Neither the memorandum opinion of the District Court (R. 13-25) nor the opinion of the Court of Appeals (R. 64-68) has as yet been published.

Jurisdiction

The judgment of the Court of Appeals was entered on October 9, 1951 (R. 68). The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1254(1).

Question Presented

The Court of Appeals affirmed a judgment of the District Court on the ground that it represented a "permissible conclusion" on a "doubtful question of local law." It further noted, in accordance with its unique and arbitrary rule of appellate review, that "we will not reverse even though we may think the law should be otherwise."

The question here presented is whether a Court of Appeals which applies such a rule of appellate review fulfills the duty of mandatory appellate jurisdiction of "all final decisions of the district courts" (28 U. S. C. 1291 and 1294) and the duty, in diversity cases, to determine local state law under the Rules of Decision Act (28 U. S. C. 1652).

Statutes Involved

1. The Rules of Decision Act is involved, 28 U. S. C., Section 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

2. 28 U. S. C., Section 1291, relating to the appellate jurisdiction of courts of appeals is involved:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of

the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

3. 28 U. S. C., Section 1294, also relating to the appellate jurisdiction of courts of appeals, is involved:

"Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; * * * June 25, 1948, c. 646, 62 Stat. 930."

Statement

The question arises from the Court of Appeal's affirmance of a decision of the District Court for the Western District of Missouri in a declaratory judgment involving a lease of Missouri property. Federal jurisdiction is based upon diversity of citizenship of the parties.

The respondent's petition for declaratory judgment alleged, among other things, that the lease did not contain "a definite or certain termination date" (R. 3) and consequently should be adjudged "invalid".

The lease in suit provided "for a term commencing October 1, 1943 and ending sixty (60) days after the signing of the treaty of peace upon the close of the war with Germany and/or Japan whichever treaty of peace is the latest" (R. 5). The rent for the first year of the lease ($6,000) was payable in advance; the annual rent for the balance of the term, was at the same rate. "The evidence is that * * * the parties contemplated exactly what is provided in the lease, i.e., that its term would continue for at least one year, and thereafter * * * until a treaty of peace was signed by the United States with Germany or [and] Japan" (R. 19).

The District Court found for the respondent. It declared the lease "invalid as the granting of an estate for years from October 1, 1944" (i.e., after the first year of the lease) and held that since that date the petitioner occupied the premises "as a tenant at will" (R. 25). It stated as its major premise "that in the creation of an estate for years, by way of written lease, the term of such estate must be precisely stated, or be such that it can be determined with certainty, both as to the commencement thereof and as to the duration of the term" (R. 19).

Although the District Court remarked that the signing of the peace treaties was not such an event as would occur with "a reasonable degree of certainty" (R. 22), it held as "the determinative factor" (R. 26) that there was no certainty of the *date* of occurrence of that event which would terminate the lease (R. 26).

The Court of Appeals affirmed (R. 68). It accepted without discussion the basic premise of the District Court's decision that an estate for years must have the requisite certainty of commencement and termination.[1] The Court of Appeals rested its decision upon precisely the same ground as that which the District Court considered "determinative", stating it "apparently" (R. 65) was the law of Missouri "that an event certain to occur but uncertain as to time of occurrence" (R. 65-66) does not create a term tenancy.

The appellate court relied only upon the cases mentioned and discussed in the lower court's opinion. It cited *Idalia Realty & Development Co.* v. *Norman*, 232 Mo. 663, as "authority" for the rule; it quoted at length certain dicta in *State ex rel. Rumbold* v. *Gordon*, 238 Mo. 168, and also *Stanmeyer* v. *Davis*, 321 Ill. App. 227, all precisely as interpreted by the District Court.

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[1] The Court of Appeals did not think it necessary to dwell upon the certainty of the signing of the peace treaties, and simply "assumed" the certainty of the happening of that event (R. 65).

The Court of Appeals then held that, on the basis of the authorities relied upon by the trial court, (R. 67):

> "It is, to say the least, a *permissible conclusion* that, under the law of Missouri, a lease which is to end upon the happening of an event certain to occur but uncertain as to the time when it will occur, does not create a valid tenancy for years." (Italics added.)

The Court of Appeals then stated as its rule of appellate practice in cases involving a determination of state law that "This Court has repeatedly ruled that it will accept the considered view of a District Judge as to doubtful questions of local law" (R. 67).

It elaborated upon this rule of appellate review, by quoting from *Western Casualty & Surety Co.* v. *Coleman*, 8 Cir., 186 F. 2d 40, 43, as follows:

> "In a case controlled by local law, that burden (of demonstrating error) is a peculiarly heavy one. This Court is not an appellate court of the State of Missouri and establishes no rules of law for that state. * * * If a federal district judge has reached a *permissible* conclusion upon a question of local law, *we will not reverse, even though we may think the law should be otherwise.*" (R. 68; italics and parenthesis added.)

While the Court of Appeals stated at the very end of its opinion that the District Court had reached not only a permissible conclusion but also a "correct one", these words were clearly added parenthetically and as an afterthought. Moreover, as will be demonstrated *infra*, the fact that the District Court's determination was not correct would have been readily apparent to the Court of Appeals had it made an independent determination and not given such conclusive effect to the lower court's decision.

REASONS FOR GRANTING THE WRIT

I

The rule of appellate review applied by the Court of Appeals (1) conflicts with the decisions of this Court, (2) conflicts with the practice of all other circuits and (3) deprives litigants of any review on appeal.

In this case the Court of Appeals for the Eighth Circuit arbitrarily narrowed the scope of its appellate review to a determination of whether the District Court reached a permissible conclusion on a difficult question of state law. If the test of permissibility is met, the Court of Appeals affirms, even though it may think the lower court interpreted the local law incorrectly.[2]

The instant case is the latest of a long series of cases applying this rule of appellate review.[3] It was announced by the Eighth Circuit for the first time in 1943 in the case of *Magill* v. *Travelers Ins. Co.*, 8 Cir., 133 F. 2d 709, 713, and has since become firmly established, having been applied in twelve cases in 1950 alone.[4]

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[2] *Western Casualty & Surety Co.* v. *Coleman*, 8 Cir., 186 F. 2d 40, 43. See also *Buder* v. *Becker*, 8 Cir., 185 F. 2d 311, 315, where the Court of Appeals stated that "If this case had come to us originally we might in reliance upon the general Missouri rule, have accepted the appellants' construction of the statute." However, it added that it was compelled to follow the district court's decision even though "whether the Missouri Courts will accept the construction of the statute given it by the trial judge is problematical."

[3] See the list of 18 Eighth Circuit cases applying this rule cited in *Buder* v. *Becker*, 185 F. 2d 311, footnote 2, p. 315.

[4] In addition to the *Buder* case and the last five Eighth Circuit cases in the list of cases in footnote 2 on p. 315 of 185 Fed. 2d, reporting *Buder* v. *Becker*, there were six more cases, making a total of twelve decided in the year 1950 on the basis of the rule: *Maryland Casualty Co.* v. *Dalton Coal & Material Co.*, 8 Cir., 184 F. 2d 181, 183 (Sept. 8, 1950); *New York Cas. Co.* v. *Lewellen*, 8 Cir., 184 F. 2d 891, 894 (Oct. 30, 1950); *Fargo Nat. Bank* v. *Agricul-*

It is thus important for this Court to grant a review. This case involves not an isolated situation but rather a widely applied rule that has pervaded the entire fabric of appellate practice in the Eighth Circuit.

1. The rule is contrary to authoritative decisions of this Court.

In *Huddleston* v. *Dwyer*, 322 U. S. 232, 236, this Court clearly held that under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the courts of appeals are required to pass upon applicable state law:

> "It is the duty of the federal appellate courts, as well as the trial Courts, to ascertain and apply the state law where, as in this case, it controls decision."

The fact that the state law is difficult to determine does not excuse the courts of appeals from making a determination. As this Court recently stated in *Estate of Spiegel* v. *Comm'r of Internal Revenue*, 335 U. S. 701, 707:

> "The record reveals that the state law problem here is not an easy one, but under this Court's decision in Meredith v. Winter Haven, 320 U. S. 228, the difficulty involved did not relieve the Court of Appeals of its duty to make a decision."

The Eighth Circuit Court of Appeals implies in its opinion that its rule of appellate practice is supported by the decisions of this Court [5] (R. 67). The Supreme Court cases

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tural Ins. Co., 184 F. 2d 676, 683 (Nov. 1, 1950); *Standard Brands, Inc.* v. *Bateman*, 8 Cir., 184 F. 2d 1002, 1011 (Nov. 13, 1950); *Fireman's Fund Ins. Co.* v. *Vermes Credit Jewelry*, 8 Cir., 185 F. 2d 142, 146 (Nov. 24, 1950); and *Western Casualty & Surety Co.* v. *Coleman*, 8 Cir., 186 F. 2d 40, 43 (Dec. 29, 1950). The opportunity to apply the challenged rule is present in every diversity case involving a question of local law. More cases of that type came before the Eighth Circuit than any other type of case. See Table B-5, page 126, of 1950 Annual Report of the Director of the Administrative Office of the United States Courts.

[5] The Court of Appeals stated: "Many of the cases in this Court and the Supreme Court which support that rule will be found in the case of *Buder* v. *Becker*, 185 F. 2d 311, 315, 316" (R. 67).

cited in *Buder* v. *Becker,* 8 Cir., 185 F. 2d 311, footnote 2, 315-316, do not relate to the scope of appellate review by a court of appeals. Rather they apply a rule of this Court alone to the effect that it will "leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges" (*MacGregor* v. *State Mutual Life Assurance Co.,* 315 U. S. 280, 281).

It is obvious that this Court has never intended the various courts of appeals to adopt its rule of appellate review with respect to questions of state law. In fact, precisely the opposite inference must be drawn, i.e. because of this Court's rule, a duty is placed upon the courts of appeals to adjudicate local law, so that this Court may safely concentrate on other phases of appellate jurisdiction.

2. The Eighth Circuit's rule of appellate review conflicts with the appellate practice of every other circuit.

The Eighth Circuit rule is not only contrary to the decisions of this Court, but also conflicts with the appellate practice of all the other circuits.[6]

The Second Circuit's rule is stated in *Cooper* v. *American Airlines,* 2 Cir. 149 F. 2d, 355, 357-8 and *Janes* v. *Sachman Bros. Co.,* 2 Cir. 177 F. 2d, 928, 932-3. In the latter case the Court held: "We agree that to refrain from deciding as best we may, the state issues presented to us 'would be to enervate diversity jurisdiction.' "

The Court of Appeals of the Third Circuit in *Barrett* v. *Denver Tramway Corp.,* 3 Cir. 146 F. 2d, 700, 702, held that "Delaware law controls the issue and it is our duty, as it was the duty of the trial court, to ascertain and apply the law of that state. *Erie* v. *Tompkins,* 304 U. S. 64."

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[6] Cyclopedia of Federal Procedure (2nd ed.), Vol. 3, 1950, Supp., p. 53, notes: "One Court of Appeals, that for the Eighth Circuit, has ruled that it will not reverse a district court in reaching a permissible conclusion on a doubtful question of state law. *Heikes* v. *N. Y. Life Ins. Co.,* 8 Cir., 171 Fed. (2d) 460."

The Fifth Circuit in *Holliday* v. *Wasle*, 5 Cir., 117 F. 2d, 154, 156, held that "This Court, as the appellate tribunal for this case, must assume the duty the Supreme Court of Florida would have if the case were before it * * *."

Cases holding to the same effect in the other circuits are as follows:

First Circuit:
Boston Casualty Co. v. *Bath Iron Works Corp.*, 136 F. 3d, 31, 33;

Fourth Circuit:
New England Mut. Life Ins. Co. v. *Mitchell*, 118 F. 2d, 414 cert. den. 314 U. S. 622;

Sixth Circuit:
Egyptian Supply Co. v. *Boyd*, 117 F. 2d, 608, 612;

Seventh Circuit:
Chicago Wellington and Franklin Coal Co. v. *Herr*, 127 F. 2d, 1010, cert. den., 317 U. S. 669;

Ninth Circuit:
Hughes v. *Mut. Life Ins. Co.*, 180 F. 2d, 542, 545;

Tenth Circuit:
Versluis v. *Town of Haskell, Okla.*, 154 F. 2d, 935, 937.

It is apparent from the foregoing illustrative cases that every other circuit has a rule inconsistent with the rule of appellate review of the Eighth Circuit here challenged. The orderly administration of justice requires that certiorari should be granted to determine which rule is correct.

3. The Eighth Circuit's rule of appellate review leads to undesirable results in practice.

As we have indicated above (p. 8) this Court relies heavily upon the decision of the circuit courts in the determination of questions of local law. If the circuit courts in turn should employ the rule of this Court and give a

similar unquestioning acceptance to district courts' decisions, this Court's rule could not be philosophically or pragmatically defended.

Again, the Eighth Circuit's rule deprives that Court, vested with mandatory power of review, *pro tanto* of the very jurisdiction for which it was created. This deprives litigants in the federal system of the right to any appeal whatever in such cases.

The experience in the First Circuit on appeals from the Supreme Court of Puerto Rico involving questions of local law bears this out. Rule 39 of that Circuit provides that in such cases "an appellant shall be required to show * * * that the judgment appealed from is 'inescapably wrong' or 'patently erroneous'." That Court of Appeals has protested in *DeCastro* v. *Board of Commissioners of San Juan*, 1 Cir., 136 F. 2nd, 419, 425, 426, aff'd 322 U. S. 451, that its "appellate jurisdiction in this class of cases is pretty much of a dead letter." There is reason arising from the history and origins of that territory, for that special rule; none such exist for the Eighth Circuit.

Moreover, a rule of appellate review which requires affirmance of every permissible conclusion as to local law invites chaos within the circuit. Presumably many decisions on close questions, and any decision which has the backing of some local case as "authority" (R. 66) or is "apparently" consistent with local law (R. 65), would call for affirmance. There are six districts in the 8th Circuit; each could reach a different yet possibly permissible conclusion; and each would require affirmance under the rule here applied. The application of such a minimum standard could clearly lead to an erosion of the *Erie Railroad* v. *Tompkins* doctrine. For it is apparent that while there may be only one correct decision, there may be any number of permissible conclusions, all of which may be mutually inconsistent, some even contradictory of each other.

II

The Eighth Circuit's rule of appellate review led the Court of Appeals erroneously to affirm the District Court's judgment.

The instant case is a typical example of the inherent vice in the Eighth Circuit's rule. The Court of Appeals' acceptance of the "permissible conclusion" of the District Court led it to affirm a decision based not on one but on a number of errors, all arising from superficial analysis and the easy acceptance of perpetuated error.

To make this point clear it is necessary to discuss briefly the facts and the law in this case and to indicate how error has been compounded.

1. The weight of the Missouri law and the common law of the various states is that a lease providing for termination upon the happening of an event certain to occur but uncertain as to the precise time of occurrence creates a tenancy for years.

The Court of Appeals in its search for a "permissible conclusion" of Missouri law followed the District Court in placing complete reliance upon *Idalia Realty & Dev. Co.* v. *Norman*, 232 Mo. 663. The lease in that case provided that the lessee would have "the privilege of renting the last named lands at a yearly rent of twenty-five dollars per year * * * until mill is removed." The Missouri Supreme Court made it very clear that the uncertainty which invalidated the lease as a term for years was the obscurity of the meaning of the words "until mill is removed." The Court said (pp. 673-674):

> "The uncertainty indulged in is the very sum of the whole brood of uncertainties. What does the phrase, 'until the mill is removed' mean? By whom is it to be removed? On what contingency is it to be removed? Suppose it be never removed, what then? Does the word 'mill' mean merely the physical structure or does

> it mean a going saw mill? If the former, would it be removed if left lifeless to rot on the ground * * *. But it is idle to speculate when it is out of the question for speculation to result in any sensible working hypothesis. The parties voluntarily left the matter in impenetrable obscurity and uncertainty, without a guide post to a right goal of interpretation."

The uncertainty in that case was thus an ambiguity as to the description of the event upon which the lease was to terminate and not an uncertainty as to the time when a definite event would occur. This would have been apparent to the Court of Appeals if it had made an independent analysis of the cases. In fact, the Missouri Supreme Court indicated that the precise time when an event terminating a lease would occur is not material as long as the terminal event itself is definite and certain. It stated (p. 674):

> "If the body of the lease had shown the end of the term by the use of language indicating that the lease was for a definite purpose and when that purpose was subserved the lease was at an end * * * we would have a different case to deal with."

The inference is clear that where a lease is ended upon the happening of a certain event, a tenancy for years is created in accordance with the maxim "that is certain which can be made certain." Similarly the Missouri court has interpreted that maxim in an analogous situation involving the validity of a negotiable instrument payable upon death to mean "that is certain which will come to pass inevitably, though not ascertainable until it does happen." *Maze* v. *Baird*, 89 Mo. App. 348, 353.

Other Missouri cases which have invalidated leases fall into one of two categories that either the terminal event was uncertain ever to occur, or it was left to the discretion and control of one of the parties.[7] In the latter circum-

[7] In *Smith* v. *Smith Bros.*, 62 Mo. App. 596, the lease continued "until the shelving was put in their [Tenant's] new store building." In *Corby* v. *McSpadden*, 63 Mo. App. 644 (cited by the District

stance, the lease is clearly, and literally, "at will"—a distinction overlooked by the Court of Appeals.

State ex rel. Rumbold v. *Gordon,* 238 Mo. 168, quoted at length from the Court of Appeals at R. 66, 67. That was an action by a state officer to compel the state auditor to pay him an increase in salary. The statements in the opinion as to landlord and tenant law were gratuitous.

Despite the lack of Missouri authority, but in keeping with its appellate practice to determine only whether or not the District Court had reached a "permissible conclusion", the Court of Appeals relied upon the single out-of-state case cited by the District Court, i.e., *Stanmeyer* v. *Davis,* 321 Ill. App. 227, decided by a lower Illinois Appeals Court. But the case is not authority for the rule, as stated, that a lease terminable upon the happening of an event certain to occur but uncertain as the time when it will occur does not create a tenancy for years. The term of the lease in question was "for the duration of the war and until automobiles are again produced • • • [and] until defendant receives twenty-five automobiles in any one month." The Illinois Court stated (p. 232):

> "The last provision is objectionable not only on account of uncertainty but also for the reason that the time of happening of the uncertain event might easily depend solely upon the will of the tenant."

The limited scope of appellate review adopted by the Court of Appeals led it to ignore common law authorities in various jurisdictions far more cogent than the *Idalia, Stanmeyer* or *Rumbold* cases.

The closest case on the facts is *Smith Transfer and Storage Co.* v. *Hawkins,* 50 A. (2d) 267 decided by the

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Court, R. 20, 21), the lease was "for a period of time commencing May 1, 1881, and until the party of the first part is prepared to improve the ground with new buildings." In *McClain* v. *Abshire,* 72 Mo. App. 390 (cited by the District Court at R. 20), the lease commenced "on the day when the rooms in said second story are ready for occupancy."

Municipal Court of Appeals for District of Columbia. The lease there provided for a term:

> "to continue for one year certain, and if at the end of that period the present war of the United States with Germany and Japan has not been terminated the lease shall continue at the rental herein until the end of the war with Germany and Japan as determined by proclamation of the President of the United States, or by joint resolution of the Congress of the United States."

The Court there flatly rejected the alleged rule of the Illinois case of *Stanmeyer* v. *Davis*, supra, saying (p. 268):

> "It is settled that an ordinary lease of tenancy for years must be certain in respect to commencement, duration and termination, or be capable of being made certain by reference to some collateral event or thing which in itself is certain.
>
> * * * * * * *
>
> We think it obvious that the end of the war as determined in the manner specified is certain to happen. That an uncertain time may elapse before it occurs does not lessen the certainty of its occurrence * * *. Further, the collateral event is not in any way within the control of either party to the lease."

In *Beeson* v. *LaVasque*, 144 Ark. 522, the term of the lease in suit was "during the time which the said V. A. Beeson may be in the military service of the United States." The highest court of Arkansas in declaring the lease valid for a term of years stated (p. 524):

> "The general rule is that if the time of performance of the contract is one which is bound to happen at some time in the future, such contract is certain, even though the time can not be fixed in advance.
>
> * * * * * * *
>
> In the application of the principle above announced we do not think it can be said that the period of time for the existence of the contract is too indefinite to be capable of enforcement."

To the same effect are:

Horner v. *Leeds,* 25 N. J. L. 106;
Wunsch v. *Donnelly,* 302 Mass. 286.

It is thus apparent that while the conclusion of the District Court may have been "permissible" in the sense that it may have the support of one lone Illinois case, it is not consonant with the overwhelming weight of *common law* authority.

The Court of Appeals, in the concluding words of its opinion, said that the District judge "reached not only a permissible conclusion, but, we think, a correct one"; this may possibly be advanced as indicating a studied opinion and a full review.

However in view of the Court of Appeals' own statement of the standard of appellate review it applied, any affirmance, no matter how strongly it may be asserted to the contrary, can only be a holding that a permissible conclusion has been found, because anything beyond that is dicta. In this case we need not so argue, for the opinion of the Court of Appeals clearly shows that it "assumed" (but did not decide) that "*apparently*" the law was as stated by the District Court—and that a permissible conclusion was found. In this situation, the closing words of the opinion are too casual to be given more weight than the Court itself endowed them with—clearly an off-hand comment, and not a considered opinion.

But our point here is not simply that the Court of Appeals erred in its determination of Missouri law. If that Court's rules enabled it to hold, and it had held, that the District Court's decision was correct on its merits, this application would not be before this Court. But the Court of Appeals' opinion indicates that its standard of appellate review was to determine only whether or not the trial court reached a "permissible conclusion"; and it determined only that.

Our point then is that the Court of Appeals was wrong *because* its rule of appellate practice prevented it from

making an independent determination of the case on its merits. This case is an almost startling example of one crying for independent review and determination; for the Court of Appeals "conceded" that there is no case in point in Missouri;[8] consequently the law had to be sought for, considered, and declared. Here the District Court's decision made Missouri law. The appellate court, by giving such unquestioning acceptance to the lower court's decision, in effect, deprived the petitioner of its statutory right to an appeal (28 U. S. 1291, 1294).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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January 7, 1952.

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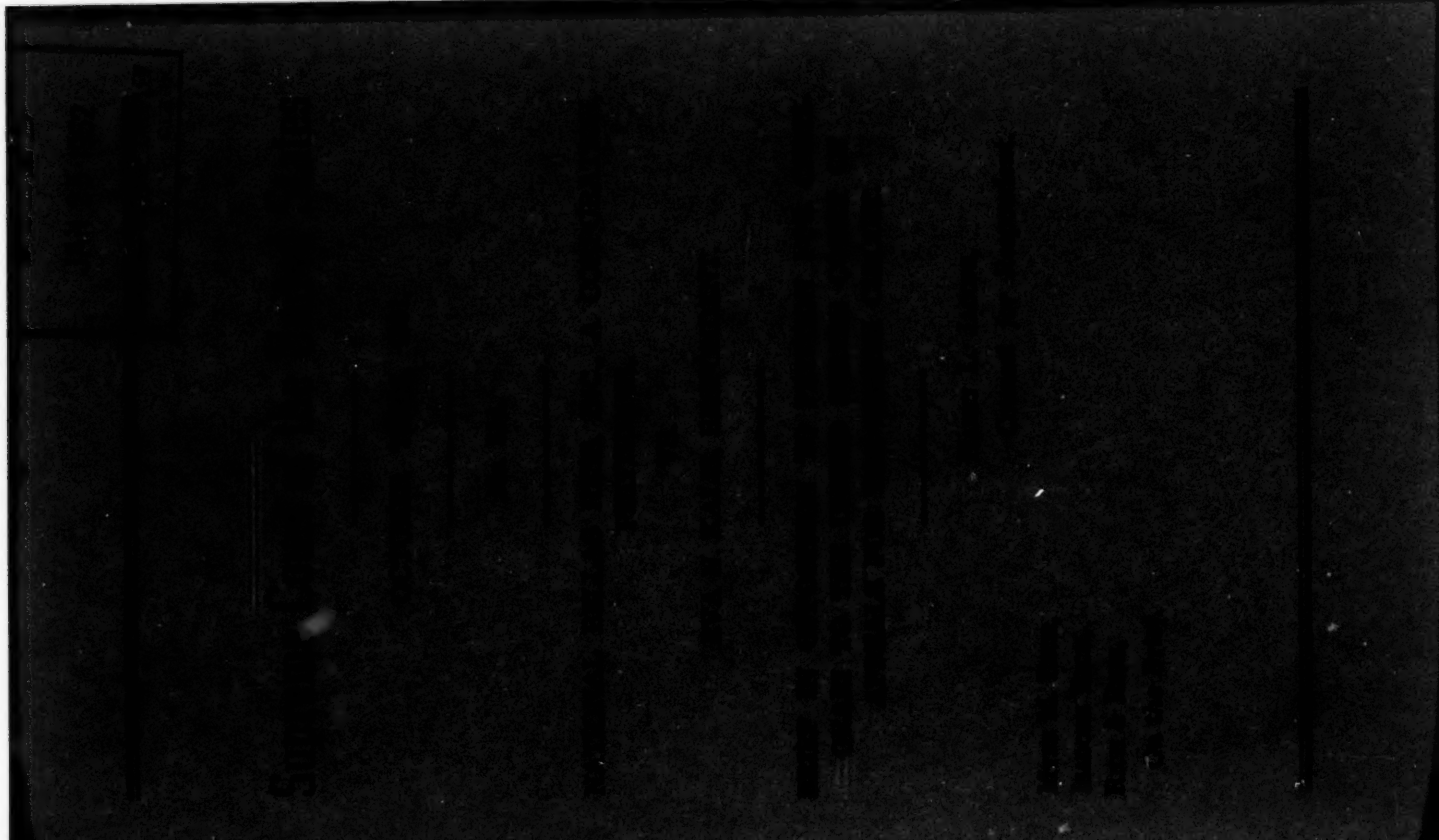
[8] The Court of Appeals stated: "It is conceded that no case involving the validity of a lease such as that in suit has been decided by a Missouri court" (R. 65).



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A. Under the common law the lease was invalid as a lease for years for uncertainty of the term ____ 3

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MISCELLANEOUS

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Thompson on Real Property (1924), Vol. II, page 188 ——— 5, 11
Tiffany on Real Property, 3rd Edition, Vol. I, pages 130, 131 (1939) ——— 4, 11

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 516.

NATIONAL BELLAS HESS, INC., A CORPORATION, PETITIONER,

VS.

EVA N. KALIS, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

Errata.

By inadvertence, Counsel for National Bellas Hess, Inc., which has petitioned for the Writ, have signed their petition as Counsel for *Respondent* instead of Petitioner.

QUESTION PRESENTED.

The question here presented is whether the Court of Appeals for the Eighth Circuit properly affirmed the judgment of the District Court to the effect that a lease was invalid for lack of certainty of term where it provided that it was:

"for a term commencing October 1, 1943, and ending sixty (60) days after the signing of the treaty of peace upon the close of the war with Germany and/or Japan whichever treaty is the latest."

The reason urged by petitioner for the granting of the writ that the Court of Appeals completely abdicated its duty to exercise appellate jurisdiction is specious and without merit. The Court of Appeals examined the precise question involved and found that the conclusion of the trial court *was permissible*, that is, justifiable under and supported by local law, and then, and only then, declared its practice under such circumstances of deferring to such a supportable conclusion. In this very process the Court of Appeals had to and did exercise appellate jurisdiction. The Court of Appeals examined the local law independently and without regard to the persuasive character of the decision of the court below and upon such independent examination arrived at the same conclusion.

STATEMENT.

A lease was executed on the premises involved in this action on the 22nd day of September, 1943. Respondent became successor lessor. Petitioner became successor lessee. The lease was effective commencing October 1, 1943. At the time the lease was executed, lessee paid one year's rent in advance, which made the term of the lease certain to and including September 30, 1944.

The District Court held the lease was invalid after October 1, 1944, and that the duration of the term of the lease was uncertain as a matter of law (R. 26).

The Court of Appeals affirmed. Under the law of Missouri, no other judgment was possible.

Petitioner contends that the Court of Appeals for the Eighth Circuit failed to perform its sworn duty in this case to consider independently, on appeal, the law and the facts and to render its *own opinion* affirming or reversing but instead, without any independent consideration, simply affirmed the judgment of the District Court (Pet. p. 16).

The opinion of the Eighth Circuit in this case dispels the unjustified charge.

REASONS AGAINST GRANTING THE WRIT.

I.

The judgment of the Court of Appeals that the lease was invalid after October 1, 1944, reflects (A) the ancient common law, (B) the judgment of the modern text-writers, (C) the judgment of the Supreme Court of Missouri, and (D) the judgment of the District Court.

A. Under the common law the lease was invalid as a lease for years for uncertainty of the term.

The Court of Appeals said (R. 65):

> "Obviously, the lease in suit by its terms was from the beginning, and is now, of uncertain duration; * * * Apparently (R. 66) the Supreme Court of Missouri has followed the old common law rule* that, in

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*Mo. R. S. A., Section 645, provides: "The Common law of England and all statutes and acts of Parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Courts of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, etc. * * *"

order to create a valid tenancy for years, the duration of the term must be specified with certainty in the lease or at least be ascertainable from its provisions, and that an event certain to occur but uncertain as to the time of its occurrence, such as death, may not be used to mark the termination of the term."

The foregoing statement (not quoted by Petitioner) represents mature and reflective consideration of the law. It is the opinion of the Court of Appeals. It does not reflect an abandonment of the duty of the Court to consider seriously the matters presented to it on appeal.

Blackstone said (Cooley's Blackstone, Vol. I, Page 546):

> "Definition of estate for years.—Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. * * * A lease for so many years as J. S. shall live, *is void from the beginning*, for it is neither certain, *nor can ever be reduced to a certainty*, during the continuance of the lease. * * *"
>
> (Page 547) "Hence it follows, that a lease for years may be made to commence *in futuro* though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for 20 years, this is good; *but to hold from Michaelmas next for the term of his natural life, is void*" (Italics ours).

The Petitioner has not indicated when this ancient common law rule was "repealed" in Missouri.

B. The modern text-writers adopt Blackstone's rule.

Tiffany on Real Property, 3rd Edition, Vol. I, pages 130, 131 (published 1939), says:

> "* * * But an instrument creating an estate to endure until a particular event occurs, *the time of which occurrence cannot be ascertained beforehand*, does *not* create an estate for years. *If it did*, a lease

for life would create an estate for years, since, so soon as the life ceases, the duration of the tenancy is known. 'That a lease to endure for so many years as A shall live is *not* a lease for years.' See Coke on Littleton, 45b; Sheppard's Touchstone, 275" (Italics ours).

Thompson on Real Property (1924), Vol. II, page 188, says:

"A *long settled rule* makes it essential to the validity of a lease that it be for a definite period, either expressly fixed or *capable of being fixed by COMPUTATION*" (Emphasis ours).

C. The Supreme Court of Missouri follows Blackstone's rule.

The leading case in Missouri, and perhaps in the country on the issue herein, is *Idalia Realty and Development Co.* v. *Norman*, 232 Mo. 633, 135 S. W. 47, 34 L. R. A. (N. S.) 1069, wherein the Supreme Court of Missouri said:

"*It is essential* that the *time of duration* of every lease for years shall *be measured* by fixed periods, as BY YEARS, MONTHS, WEEKS, DAYS, HOURS, MINUTES, or the like. * * *" And again (159 *et seq.*): "When it is said * * * in the language of Lord Coke, 'regularly in every lease for years, the term must have a certain beginning and a certain end,' this is to be understood in its *legal and technical sense*. The only circumstance required in limitations of terms for years is that a precise time shall be fixed for the continuance of the terms; so that, WHEN THE COMMENCEMENT OF THE TERM IS ASCERTAINED, THE PERIOD OF DETERMINATION, BY EFFLUXION OF TIME, MAY BE KNOWN WITH CERTAINTY" (Emphasis ours).

The Court of Appeals, in deciding this case, said of the Idalia case (R. 66):

"* * * As *WE* [not the Trial Court] read the decision, it is authority for the rule that a lease pro-

viding for an uncertain period of duration is not a lease for years" (Our caps and brackets).

Thus the Court of Appeals made it clear that it was interpreting the Idalia Case, the decision of the highest Court of Missouri. Similarly that Court expressed its own opinion of its interpretation of the Idalia case by asserting (R. 66):

> "This view is borne out by *State ex rel. Rumbold* v. *Gordon*, 238 Mo. 168, 142 S. W. 316, 317."

The above quotations represent the opinion and judgment of the Court of Appeals. It does not, as alleged by Petitioner, indicate an abandonment of the Court's duty to review and an affirmance *willy-nilly* of the District Court's judgment.

The Court of Appeals cited with approval the case of *Stanmeyer* v. *Davis*, 321 Ill. App. 227, 53 N. E. 2d 22, 24, which, after citing the Idalia case, declared the law to be that (R. 67):

> "It is not the certainty of the happening of the event [which is to end the term] but the certainty of the date on which the termination of the lease will take place that is the determinative factor."

The addition of the bracketed words clearly demonstrates that the Court of Appeals was adopting the quotation as its own statement of the law on the issue. The Court of Appeals was thereby agreeing that the quotation restated the law as expressed in the Idalia case.

For a case in point, see *Easton* v. *Mitchell*, 21 Ill. App. 189, cited in the note to the *Idalia case*, 34 L. R. A. (N. S.) 1070.

The Court of Appeals, after reviewing the Missouri Supreme Court decisions in the Idalia and Rumbold cases,

arrived at its own conclusion as to Missouri law respecting the issue of the validity of the term of the lease. The Court said (R. 67):

> "It is, to say the least, a permissible conclusion that, under the law of Missouri, a lease which is to end upon the happening of an event certain to occur but uncertain as to the time when it will occur, does not create a valid tenancy for years."

It should be noted that the Court of Appeals had already expressed its own opinion of the merits of the appeal (R. 65):

> "Obviously, the lease in suit by its terms was from the beginning, and is now, of uncertain duration;"
>
> "As *we* read the (Idalia) decision, it is authority for the rule that a lease providing for an uncertain period of duration is not a lease for years" (R. 66).

D. The District Court followed the common law and the opinions of the Supreme Court of Missouri.

Having shown the conclusiveness of the decisions of the Missouri Supreme Court on the question of the validity of the term of the lease, the Court of Appeals next turned to the action of the District Judge and declared that (R. 68) on doubtful questions of local law it would not adopt views contrary to those of the trial judge unless convinced of error or that the trial court was induced by a *clear misconception or misapplication of the local law.* The Court said (R. 68):

> "The District Judge who tried this case gave painstaking consideration to the controlling issue of Missouri law. He reached not only a permissible conclusion, but, *we think, the correct one*" (Italics ours). See memorandum opinion (R. 13-25).

There could be no charge leveled at the Court of Appeals more unjustified than that made by Petitioner that the Court of Appeals had not made an independent determination of the issues presented by the Appeal (Petition for Writ, page 5).

By the last paragraph of its opinion (R. 68), the Court of Appeals said in effect that the District Judge, after applying the Missouri law, came to a conclusion which was permissible. But not only that—*WE* conclude (after *our* consideration of Missouri law) that the District Judge came to the correct judgment. His judgment is the same as our judgment. We will therefore affirm his judgment.

Petitioner says (page 4) that the Court of Appeals "accepted without discussion the basic premise of the District Court's decision that an estate for years must have the requisite certainty of commencement and termination."

The truth of the matter is that the Court of Appeals, in its opinion, went to the trouble of quoting verbatim from the Idalia case as quoted in the *Rumbold case* (R. 66):

> "A lease for years is a term, and, before an estate for years can be a term, it must have a certain beginning and a certain ending, its duration must be 'measured by fixed periods, as by years, months, weeks,' etc. * * * 'regularly in every lease for years, the term must have a certain beginning and a certain end.' * * * When the commencement of the term is ascertained, the period of determination, by effluxion of time, may be known with certainty."

This was certainly not an acceptance "without discussion of the basic premise of the District Court." It was the acceptance of the declared law of Missouri as announced by its highest court.

The Court of Appeals did not avoid its "duty of mandatory appellate jurisdiction" (Petition for Writ, page

2). It did not yield blindly to an injudicious, intemperate or illegal judgment of a District Court.

It simply happened—as it does in many cases of affirmance—that the views of the Appellate Court coincided with the views of the Trial Court and, in this case, that the views of both correctly expressed the impact of the law upon the issue presented. The issue was an extremely simple one which had been settled by the law for several centuries.

II.

A. The decision of the Court of Appeals in the case at bar does not conflict with authoritative decisions of this Court.

Conforming to the opinions of this Court in *Huddleston* v. *Dwyer,* 322 U. S. 232, 236, and in *Estate of Spiegel* v. *Commissioner of Internal Revenue,* 335 U. S. 701, 707 (cited by Petitioner, page 7), the Court of Appeals ascertained and applied the state law "where, as in this case, it controls decision" and the Court of Appeals did not attempt to relieve itself "of its duty to make a decision." See opinion (R. 66, 67).

B. The opinion of the Eighth Circuit in the case at bar does not conflict with the opinions of other Circuits.

The Eighth Circuit's rule of appellate review is a moot question here because the opinion of the Court clearly shows that the Court of Appeals in the case at bar fully determined the issues by ascertaining and applying the law of Missouri to the issues (R. 66, 67).

Petitioner has not claimed that the decision of the Court of Appeals on the main issue as to the validity of the term conflicts with decisions of other circuits *on that*

issue. Rather Petitioner has taken the position that the Court of Appeals has refused to exercise its duty to ascertain and apply the Missouri law to the issues and that in so refusing the Eighth Circuit is in conflict with other Circuits, which do not refuse to exercise that duty. *The point is moot* because the Eighth Circuit did not refuse so to do.

Nothing in the cases cited differs from the holding of the Court of Appeals in the case at bar. The Court of Appeals did ascertain and apply the local law when they examined it sufficiently to determine that the conclusion of the Court below was supportable by and in conformity with the state law.

C. Whether Eighth Circuit's alleged rule of appellate review leads to undesirable results is moot because not practiced in case at bar.

Petitioner infers (pages 9, 10) that the Eighth Circuit Court, by its rule of review, gives unquestioned acceptance to District Courts' decisions on questions of local law. Petitioner further alleges (page 10) that this rule on the part of the Eighth Circuit "deprives litigants in the federal system of the right to any appeal whatever in such cases."

The point is moot. The opinion in the case at bar shows on its face (R. 64-68) that the Eighth Circuit did not give unquestioned acceptance to the District Court's decision in this case but on the contrary it considered every issue and applied the state law thereto.

III.

The weight of the Missouri law and of the common law is that a lease providing for termination upon the happening of an event certain to occur but uncertain as to the precise time of occurrence does not create a tenancy for years.

In contending to the contrary, Petitioner refuses to face the reality of the law as expressed from ancient times to the present and refuses to read the expressions of the Missouri Supreme Court.

Blackstone said that "a lease for so many years as J. S. shall live is void from the beginning" because the term cannot be reduced to a certainty. Petitioner must contend that the signing of a second treaty of peace is more certain than death and that the date of the signing can be reduced to a certainty. This is impossible since 6 years have elapsed since the end of actual fighting and the second treaty has not yet been signed.

Tiffany says that "an instrument creating an estate to endure until a particular event occurs, *the time of which occurrence cannot be ascertained beforehand*, does not create an estate for years" (Tiffany on Real Property, 3rd Edition, Volume I, pages 130, 131—published 1939). Does Petitioner contend that the date of the signing of the second treaty of peace can be ascertained beforehand?

Thompson says that the term of the lease must be "expressly fixed or capable of being fixed by *computation*." Petitioner should oblige this Court by *computing* the term of the lease at issue.

The Supreme Court of Missouri in the Idalia case and later in the Rumbold case, said that the duration of the term of a lease must "be measured by fixed periods, as

by years, months, weeks, etc." (R. 66). But neither in the District Court nor in the Court of Appeals was Petitioner able to measure the term of this lease by fixed periods of time. Petitioner is in no better position today.

The Supreme Court of Missouri in both the Idalia and Rumbold cases said that after the lease commenced the period of determination had to be known with certainty by the "effluxion of time." Petitioner does not say the period of determination of the lease at issue may be known with certainty. Petitioner merely says that this Court should not follow the Supreme Court of Missouri in the Idalia case because the term of the lease in that case was left to the discretion of lessee.

Petitioner fails to see—or doesn't want to see—that the Supreme Court of Missouri laid down the rule that in order to constitute a valid term for years the term had to be ascertainable in fixed periods of time and that the period of determination had to be known with certainty, by the effluxion of time. That was the rule. The term of the Idalia lease did not come within the rule because the term could be fixed at the discretion of lessee. The Idalia lease was void because its term could not be measured by periods of time. It could not be so measured because the term could be ended in the discretion of the lessee in removing the mill. The Missouri rule in the Idalia case concerns measurement and ascertainment of the term of the lease and not the discretion of a party to the lease.

Petitioner asserts (page 13) that the statements of the Supreme Court regarding landlord and tenant in the Rumbold case are gratuitous because the case concerns the term of office of the State Adjutant General (not Auditor). The fact is (as shown by that decision), that the term of an office and the term of a lease are basically

the same. The Missouri Supreme Court, in the Rumbold case, held that the Adjutant General did not have a term of office because he could be removed at the pleasure of the Governor. Therefore his tenure could not be measured by periods of time. The test applied by the Supreme Court of Missouri in the Rumbold case, *i. e.*, determining whether the term could be measured by periods of time, is the same test it applies to the term of a lease.

Petitioner says (page 12):

> "* * * In fact the Missouri Supreme Court indicated that the precise time when an event terminating a lease would occur is not material as long as the terminal event itself is definite and certain. It stated (page 674):
>
> 'If the body of the lease had shown the end of the term by the use of language indicating that the lease was for a definite purpose and when that purpose was subserved the lease was at an end * * * we would have a different case to deal with.' "

The portion of the above indented quotation which was omitted, as indicated by the asterisks, referred to the case of *Conservative Realty Co.* v. *St. Louis Brewing Association*, 133 Mo. App. 261. In that case the lease was for a term certain, namely five years, with a conditional limitation that the lease could be cancelled at any time within the five years if a liquor license were refused. Obviously, the term of the lease, being for five years, was for a period measurable in months, weeks, etc., and was therefore valid, even though subject to an earlier termination by a conditional limitation.

The lease at bar is not for a term certain, subject to a conditional limitation of that term.

If the lease at bar were for a period of ten years subject to an earlier termination upon the signing of a second

treaty of peace, the term would have been valid because it would be for a term certain, *i. e.*, 10 years. But it did not so provide.

The Court of Appeals, in its opinion (R. 65) well stated the position of Petitioner:

> "* * * but the tenant contends that the event which marks the termination of the lease is one which is sometime certain to occur and that the fact that no one can foretell when it will occur does not invalidate the lease, *since the ultimate happening of the event will make certain that which was previously uncertain.*"

The Court assumed (R. 65), "for the purposes of this opinion," that it is a certainty that the treaty of peace with Germany (since dismembered) will be signed. But it may never be.

Petitioner's position is as follows: It is true that the term of the lease cannot now be measured in time and is therefore void, but *if and when* Germany (East or West or both) signs a peace treaty, then the event having transpired, the term will then be fixed and the lease will have been valid and certain since its commencement.

Such reasoning is illogical and contrary to the well settled principles of law for the past several centuries.

The Term of the lease has been uncertain since October 1, 1944, and the lease invalid since said date. The Trial Court correctly so ruled. The Eighth Circuit, upon its own consideration of the facts and the law, correctly affirmed. The judgment is for the right party.

CONCLUSION.

For the reasons, herein stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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